There can be no question but that the trial judge in the instant case fully comprehended the scope of his power and duties. In *Creagh v. United Fruit Co.*, 178 F.Supp. 301 (S.D.N.Y. 1959) cited by Judge Mansfield appears the following quotation from Moore's Fed. Practice, Par. 59.08[5], p. 3819:

> "The judge's duty is essentially to see that there is no miscarriage of justice. If convinced that there has been then it is his duty to set the verdict aside; otherwise not." p. 307

The trial judge also cited Wright, Federal Courts, 1963, to the effect that a court ". . . has discretion to order a new trial . . . if it believed that this, . . . would better serve the ends of justice." p. 370

In the absence of any conflict in the circuits, in the absence of any showing that the trial court committed flagrant error in the exercise of its discretion in denying the motion for a new trial, no writ should issue.

2. Failure to instruct the jury cannot be raised for the first time in the Petition for Writ of Certiorari.

Absent exceptional circumstances, Petitioner cannot raise the question of failure to charge when it was neither urged nor briefed below. *California v. Taylor*, 353 U.S. 553, 556n (1956); *Lucier v. United States*, 355 U.S. 339, 362n (1957); *Hursty v. United States*, 228 U.S. 694, 701-702 (1930).

Failure to instruct the jury on the issue of fraud was not before the District Court on the motion for judgment n.o.v. or for new trial, nor before the Circuit Court on the appeal from the denial of Petitioner's post-trial motions. Having failed to make a record with respect to this alleged error, it cannot now be advanced for the first time.

3. There is no important question of Federal Law.

The obligation to furnish a safe place to work and a seaworthy vessel cannot be vitiated by a seaman's misrepresentation as to a prior injury. *Still* v. *Norfolk & Western R. Co.*, 368 U.S. 35, 45 (1961); *Spinks* v. *U.S. Lines Co.*, 223 F.Supp. 371, 372 (S.D.N.Y. 1963). The Congress, aware of the distinctions between seafarers and railroad employees in enacting the Jones Act, 46 U.S.C. 688, nevertheless mandated that the Federal Employer's Liability Act, 45 U.S.C., Sec. 51 *et seq.*, shall be applicable to seamen. This Court is bound thereby.

The mere fact that Petitioner disagrees with the holding of *Still, supra*, does not raise a serious question of federal law such as would warrant grant of a writ of certiorari.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be denied.

Respectfully submitted,

ABRAHAM E. FREEDMAN
Counsel for Respondent
36 Seventh Avenue
New York, New York 10011

APPENDIX

Excerpts from Testimony

(19) Roy L. Compton, the plaintiff herein, called as a witness, being first duly sworn, testified as follows:

* * *

(21) *By Mr. Phillips*:

Q. How far did you go to school? A. I went to the 12th grade.

Q. Are you making a claim here because of an accident that occurred to you? A. Yes, sir.

Q. What was the date of that accident? A. May 14, 1966.

Q. What was your occupation? A. I was a merchant seaman.

* * *

(22) Q. You were employed by Luckenback at that time? A. Yes, sir.

Q. What ship were you on? A. The SS Horace Luckenback.

Q. What was your job on that ship? A. I was wiper on that ship.

Q. What department were you working in? A. In the engine department.

* * *

Q. Had you ever sailed as a wiper before you joined the Horace Luckenback? A. No, sir.

Q. What were the duties of a wiper on board the Horace Luckenback in May, 1966? A. The duties of a wiper was cleaning, mopping, sweeping and other duties given to him by the first engineer.

Q. When did you first join the ship? A. I first joined the ship in March 11, 1966.

* * *

(24) Q. Where on board the ship did your accident occur? A. It occurred in the steering gear room.

Q. That is the steering gear room? A. Steering gear room.

Q. Where is that located on board the ship in relation to the rest of the ship? A. It is located at the rear of the ship.

Q. At what level of the ship? A. One flight below the main deck.

Q. How do you get to the steering gear room? A. You get there by a ladder.

* * *

(25) Q. Were you working at the time of your accident? A. Yes, sir.

(26) Q. Under whose orders were you working? A. The first engineer.

Q. What orders had you received from the first assistant engineer? A. I had received orders to go down to the steering gear room and clean up the oil that was over the deck and under the machinery and equipment in the steering gear room.

Q. Was the first assistant engineer your superior officer on board the vessel? A. Yes, sir.

* * *

(29) Q. You say that the first assistant engineer went with you to the steering engine room? A. Yes, sir.

Q. When you entered the steering engine room on this occasion, what did you observe with respect to the deck of the steering engine room? A. I observed oil, puddles of oil on the deck of the steering gear room, and also oil under the machinery.

* * *

(31) Q. Did the first assistant engineer tell you how to go about cleaning up this oil? A. Yes, sir.

Q. What did he tell you? A. He told me to take some rags and walk in this area with the rags and clean the oil up from under the machinery.

Q. Did he give you any sawdust? A. No, sir.

Q. Did he furnish you with a mop? A. No, sir.

Q. Now, how much time elapsed from the time that you first entered the steering gear (32) room until you had your accident? A. Well, it was between 10:30 and 11.

Q. What was between 10:30 and 11, is that when you had your accident? A. Yes, sir.

Q. What time did you first get into the steering engine room? A. About 8:30.

Q. Between 8:30 and 10:30 did you leave the steering engine room at any time before you had your accident? A. No, sir.

* * *

Q. Was there any way that you could do the work in the manner in which you were instructed without stepping onto the oil? A. No, sir.

Q. What type of shoes were you wearing at the time? A. I was wearing regular low, quarter work shoes.

(33) Q. Did you get oil on those shoes in the course of doing work? A. Yes, sir.

Q. Now, tell the Court and jury what happened to you. A. Well, after I had finished the job I was on my way up the ladder and I got about middle ways of the ladder, I slipped and twisted my knee and hit it on the edge of the stairs.

* * *

(43) Q. Did you ever injure your left knee before May 14, 1966? A. Yes, sir.

Q. When was that? A. That was some time in '59 or '60.

Q. How did you injure it? A. I injured it in a football game.

Q. Did you receive any medical treatment for that left knee injury back in those days? A. Yes, sir.

Q. What was done for you? A. There was surgery on the knee.

Q. Where? A. At John Sealy Hospital in Galveston, Texas.

Q. Did you have any other treatment for your knee besides the surgery at the John Sealy Hospital in Galveston, Texas? A. You mean after the surgery? Yes, sir.

Q. What did that consist of? A. The knee was swelling and I went back (44) to have fluid withdrawn from the knee.

Q. When was the last time that you went to the John Sealy Hospital to any other hospital or any doctor for medical treatment for your left knee as a result of the football injury? A. It was in April of '62.

Q. From April of 1962 until May 14th of 1966, did you have any problems with your left knee? A. No, sir.

Q. Did you engage in all of the activity that you had engaged in prior to the football injury? A. I engaged in all the activities except football.

Q. Did you have any problem with your left knee as a result of weather changes between April of 1962 and May of 1966. A. No, sir.

Q. Did you work during that period of time? A. Yes, sir.

Q. What jobs did you hold? A. I worked at a hardware store and I also worked as a longshoreman.

Q. What were your duties in the hardware (45) store you worked at? A. I was working at stock clerk and sometimes there would be heavy lifting.

Q. What was your job as a longshoreman? A. Loading and unloading ships. There could be heavy lifting work.

Q. Did you ever have any difficulty with your knee between April, 1962 and May, 1966 while doing any of this heavy lifting on these jobs? A. No, sir.

Q. Had you been in the steering engine room at any time prior to May 14, 1966 on board the Horace Luckenback? A. Yes, sir.

* * *

Roy L. Compton—for Plaintiff—Direct

Q. How many time had you been in the steering engine room before May 14th? A. I had only been there once.

Q. Do you have any regular duties which would take you back to the steering engine room? A. No, sir, not until the first tells me to.

Q. How long prior to May 14th did you go (46) back to that steering engine room? A. It was about two weeks.

Q. Under whose orders? A. Under the first engineer.

Q. What job were you ordered to do at that time? A. I was ordered to do the same job.

Q. What was the condition of the deck at that time in comparison to what you observed on May 14, 1966? A. It was in the same condition. There was puddles of oil all over the deck and under the machinery in the steering gear room.

Q. After this accident, did you sign any statements with regard to this accident? A. Yes, sir.

Q. Did you prepare the statement that you signed? A. No, sir.

Q. Were you asked to write out what happened to you? A. No, sir.

Q. Who prepared this statement? A. The chief mate.

(47) Q. Did you tell the chief mate what happened to you in the steering engine room? A. Yes, sir.

Q. Did you also tell him about your prior injury playing football? A. Yes, sir.

Q. What was your physical condition at the time that you signed the statement? A. Well, I was in pain and when he came, he asked me to sign the statements, and I signed the statements.

Q. What did the mate tell you before you signed the statement? A. He told me, "This is the report that you gave me," and I believed him and so I signed the statements.

* * *

Q. Did you read the statement before you signed (48) it? A. No, sir, I didn't read it.

Q. As a matter of fact, you signed it twice, didn't you? A. Yes, sir.

Q. Did you read either statement before you signed them? A. No, sir, I didn't.

Q. Did he ask you to read either one of the statements you signed? A. He didn't ask me to read; he just asked me to sign.

* * *

Q. Before you went on board the Horace Luckenback, were you required to take a pre-sign-on-physical examination? A. Yes, sir, I was.

(49) Q. Did you at that time complete a form which was given to you by somebody in the office wherever you took this examination? A. Yes, sir.

Q. At the time that you took this pre-sign-on physical, were you required to disrobe? A. Yes, sir.

Q. Did you have any—do you have any scar on your knee from the first injury? A. Yes, sir.

Mr. Phillips: May I ask the indulgence of the Court to permit the plaintiff to show to the jury the scar he had from the first injury?

The Court: Yes.

Mr. Phillips: Would you step down right here, over here where every one can see you, and would you raise your left trouser leg.

Step over here a little bit further. Would you point out to the jury the scar, the scar from the first operation?

* * *

The Witness: Yes, sir. This scar here is the scar from the first operation.

Mr. Phillips: Can everyone see that?

(50) Just walk down a little bit.

Would you also point out to the jury the scar from the second operation?

The Witness: Yes, sir, the scar, this top scar is the second operation.

* * *

JOHN THOMAS KEARNS, for Plaintiff:

(110) Q. When were you on board the Horace Luckenback? A. It was in May—it was in '66, anyway. You have the discharge there.

Q. I have here a certificate of seaman's service issued by the United States Coast Guard. Does that refresh your recollection as to when you were on board the vessel? A. That's correct.

Q. Would you look at the dates on there and tell us when you served on board? A. That would be April 8, 1966 to May 1, 1966—yes, that's right.

Q. Did you make any other trip on her? A. Yes, I made the coastwise, too. That would be May 2, 1966 to May 25, 1966.

Q. In what capacity did you sail on the Horace Luckenback? A. As oiler.

* * *

(111) Q. Did you have any duties with respect to the steering engine room? A. Twice a watch.

(112) Q. What would you do twice a watch? A. When you first take the watch over, you check the motors and check the oil to make sure that the oil is level in the gauges and to make sure the motors are not running hot.

Q. You have to go back there? A. That's right, twice a watch.

* * *

Q. Now, was there anything unusual about the steering engine room on board the Horace Luckenback? A. Yes,

it was oily. The decks were oily and wet and I reported it to Mr. O'Neill, my (113) boss, the third assistant.

* * *

Q. How much oil was there on the deck of the steering engine room? A. Just enough to make it slippery, you know.

Q. Was this a continuous condition when you served on board the vessel? A. It was. It was, indeed.

Q. Was it this way on May 14, 1966? A. That's right. That is correct.

* * *

(114) Q. Was anything done about this condition after you reported it? A. They cleaned it.

Q. After it was cleaned, what did you observe? A. It would still leak. Where the leak came from, I don't know.

---

(242) ANTONIO POLLUTRO, called as a witness by defendant, being first duly sworn, testified as follows:

* * *

Direct examination by Mr. Wilson:

* * *

(243) Q. Did you ever sail on a vessel called the Horace Luckenbach? A. Yes, sir.

Q. Were you sailing on the Horace Luckenbach in May of 1966? A. Yes, sir.

* * *

(266) Q. What was your job? A. Chief engineer.

Q. How long were you chief engineer of the Horace Luckenbach? A. From April 15, 1964 until February 9, 1968.

Antonio Pollutro—for Defendant—Cross

Cross-examination by Mr. Phillips:

(267) Q. Now, if there is some oil, a puddle of oil on the deck, that puddle will follow the roll of the ship, will it not? A. Yes, sir.

Q. And wherever that puddle has been, there will be a film of oil, isn't that also correct? A. Yes, sir.

Q. And that film will be just as slippery as the puddle itself, isn't that correct? A. Yes, sir.

Q. If somebody has oil on his shoes and he walks on these nonskid—

* * *

Q. —diamond-backed, nonskid steel treads, there would be a deposit of some of that oil on the treads, isn't that correct? A. Yes, sir.

Q. And those treads would become slippery, isn't that correct? A. Yes, sir.

* * *

Excerpts from Petitioner's (Defendant-Appellant below) brief before the Circuit Court of Appeals

2

* * *

Defendant-appellant filed a timely notice of appeal and presses the following:

QUESTIONS PRESENTED ON THIS APPEAL

I. Did the District Court commit error in denying defendant-appellant's motion for an order setting aside the verdict and judgment notwithstanding the verdict on the grounds that the verdict was a miscarriage of justice?

II. Did the District Court commit error in denying defendant-appellant's motion for a new trial on the grounds that the verdict was a miscarriage of justice?

III. Did the District Court commit error in denying defendant-appellant's motion for judgment notwithstanding the verdict on the ground that Compton's fraudulent concealment of a prior similar injury to the same knee had vitiated his Jones Act employment contract?

* * *

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
SEP 26 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1970

No. 599

LUCKENBACH OVERSEAS CORPORATION,

Petitioner,

v.

ROY L. COMPTON,

Respondent.

REPLY BRIEF ON BEHALF OF PETITIONER

WILLIAM A. WILSON,
Counsel for Petitioner,
116 John Street,
New York, N. Y. 10038.
COrtlandt 7-9600

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

LUCKENBACH OVERSEAS CORPORATION,

Petitioner,

v.

ROY L. COMPTON,

Respondent.

REPLY BRIEF ON BEHALF OF PETITIONER

Respondent's Brief in Opposition contends that petitioner may not argue before this Court the question of respondent's fraud on his pre-sign on physical examination (Petitioner's Point II, p. 8) because that issue "was not before the District Court on the motion for judgment n.o.v. or for new trial, nor before the Circuit Court on the appeal from the denial of Petitioner's post-trial motions" (Respondent's Brief in Opposition, Point 2, p. 6).

Respondent's argument is apparently based on the inconsequential failure of petitioner to base its fraud argument before the Court of Appeals on the narrow grounds of the District Court's refusal to charge on that issue, rather than on substantive merits (Petitioner's Brief before the Court of Appeals, Point III, p. 8).

Petitioner at the trial submitted requests to charge on the fraud issue and took proper exception to the District Court's refusal to submit those requests to the jury (Appendix D, pp. 42a-43a). The fraud point was again brought before the District Court on post-trial motions and the argument was rejected (Appendix B, pp. 17a-19a).

The issue was also clearly presented to the Court of Appeals in petitioner's Point III before that Court (Petitioner's Brief before the Court of Appeals, p. 8) and the Court of Appeals decided that issue against petitioner with no mention whatever that the issue was not properly before it (Appendix B, pp. 9a-10a).

The record clearly establishes that both the District Court and the Court of Appeals were presented with the issue of respondent's fraudulent concealment of his prior injury and that both Courts considered it. Respondent would now apparently have this Court refuse to review the ruling of the Court of Appeals on that issue because it was presented to the Court of Appeals on a substantive basis without precise mention of the District Court's refusal to charge, rather than on that narrow procedural basis. Since the requests to charge had been made and denied and those charges and that denial were before the District Court and the Court of Appeals (Certified Record Before This Court, Document 30, pp. 276-278) this Court should reject the highly technical argument of respondent and decide the issue of respondent's concealment of his prior injury on the merits.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

WILLIAM A. WILSON,
Counsel for Petitioner.